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No. 260

In the Supreme Court of the United States

SEISMOGRAPH SERVICE CORPORATION,
Appellant,
vs.
NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

JURISDICTIONAL STATEMENT.

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SEISMOGRAPH SERVICE CORPORATION,
Appellant,

vs.

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION, *Appellee.*

JURISDICTIONAL STATEMENT.

Pursuant to the provisions of Rule 13 of the Supreme Court of the United States, the appellant, Seismograph Service Corporation, files this its separate statement particularly disclosing the basis on which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein.

(a) Reference to Reports of Opinions in Courts Below.

The opinion of the Supreme Court of the State of Mississippi handed down in this case is reported at 108 So. 2d 721. The opinion of the Trial Court is unreported. A copy of the opinion of each of said courts is appended to this statement.

(b) Grounds Upon Which Jurisdiction Is Invoked.

The grounds upon which the jurisdiction of this court is invoked are those which appear below.

i) This suit was brought to recover sales taxes unlawfully assessed and collected from the appellant, Seismograph Service Corporation, by the appellee, State Tax Commission of the State of Mississippi. The suit was brought against the Chairman, State Tax Commission, in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10124, Mississippi Code of 1942, Recompiled.

ii) The judgment appealed from was rendered on February 9, 1959, and an order denying rehearing was entered on March 9, 1959. The Notice of Appeal to The Supreme Court of The United States was filed on June 4, 1959, with the Clerk of the Supreme Court of the State of Mississippi, the court possessed of the record.

iii) The statutory provision believed to confer on this court jurisdiction of the appeal is 28 USC, Section 1257(2).

iv) The cases believed to sustain the jurisdiction of this court in this appeal are, among others, the following:

Staub v. *City of Baxley*, 355 U. S. 313, 78 S. Ct. 277, 2 L. ed 2nd 302;

Society for Savings in the City of Cleveland v. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. ed. 950;

Atchison, T. & S. F. Ry. Co. v. *Public Utilities Comm.*, 346 U. S. 346, 74 S. Ct. 92, 98 L. ed. ....

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Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239;

Seismograph Serv. Corp. v. *Bureau of Revenue*, 293 P. 2d 977.

v) The statute of the State of Mississippi whose validity is involved is Section 10110, Mississippi Code of 1942, as supplemented by the administrative provisions of Sections 10111, 10120 and 10121, all being provisions of Title 40, Chapter 3, Division 1, Mississippi Code of 1942, of which the pertinent parts are as follows:

10110. "Upon every person engaging * * * in this state in the business of contracting for a fixed price, commission, fee or wage to * * * explore, test, survey * * * there is hereby levied and shall be collected a tax on account of the business engaged in equal to one per cent of the total of the contract price, or the compensation received. * * *"

"Provided, further, that where any person engaged in any business on which a tax is levied in Section 2-f (Section 10111) of this act, also qualifies as a contractor, * * * such person shall likewise pay the tax imposed by this section * * * in lieu of the tax imposed by section 2-f (Section 10111) of this act. * * *"

* * * * * * * *

10111. "Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in

equal to two per cent of the gross income of the business: * * * Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas and other mineral resources, not elsewhere taxed, * * *"

* * * * * * * * *

10120. "It shall be the duty of every person taxable under this act to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable * * *."

* * * * * * * * *

10121. "If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein * * * the commissioner may make additional returns and assessments from the best information available * * *."

(c) Questions Presented by Appeal.

The questions presented by this appeal are as follows:

i) Whether the unapportioned tax levied and collected from appellant, Seismograph Service Corporation, under Section 10110, Mississppi Code of 1942, was levied upon the gross receipts from a unitary and integral business in interstate commerce or from a local activity in Mississippi.

ii) Whether the imposition of the tax levied under Section 10110, Mississippi Code of 1942, without apportionment upon the gross receipts from appellant's business activities was unlawful as a violation of Article 1,

Clause 8 of the federal Constitution and/or the Due Process Clause of the Fourteenth Amendment thereto.

iii) Whether appellant's failure to keep records arbitrarily apportioning to Mississippi a part of its gross receipts from interstate commerce, when neither the taxing statute nor the record-keeping provisions thereof prescribe a formula for apportionment, justified the levy and collection of the tax upon all of such gross receipts.

iv) Whether the Supreme Court of the State of Mississippi erred in holding contrary to appellant's contentions with respect to each of the foregoing questions.

(d) Statement of the Case Showing the Manner in Which Federal Questions Raised.

The appellant, Seismograph Service Corporation, a Delaware corporation, has its principal office at Tulsa, Oklahoma. Its principal business is that of professional consultation upon geological and geophysical problems encountered by the oil industry throughout the United States and many foreign countries. Its services are rendered under contracts with its clients by which it agrees to furnish complete geophysical information and advice as to the subsurface formations of the earth in any given area. The primary matter which its clients seek is a finished map of the designated areas indicating by contours of relative depth the attitude of underlying sedimentary beds and other geological characteristics of the earth's crust. Such map is to be supplemented by a report containing detailed explanatory matter, corroborative geological information and recommendations for

the location of drilling sites. The finished map with the supplementing report is the product of appellant's services and is relied upon by the client in making business decisions.

In order to prepare the map and supplementary information required by the contract with the client, the appellant dispatches a technical crew to the designated area for the purpose of gathering scientific data and information by the physical operation of specialized equipment. The information and data gathered and recorded in such operations is then forwarded to the appellant's main offices in Tulsa, Oklahoma, where it is interpreted in the light of the world-wide experience of expert geophysicists assembled there. On the basis of these interpretations, a final map is drafted upon which is shown the contours of the underlying structures and a final report is written, supplementing and explaining the basis upon which the map is drawn. The submission to the client of the finished map and supplementary report constitutes the fulfillment of the obligations of the appellant under its contract.

Appellant performed its services on behalf of its clients who designated areas in the State of Mississippi on the same basis and in the same manner as described above. In brief, it gathered the raw information in Mississippi and sent it to Oklahoma for interpretation and presentation in the form required by its agreement. All such activities were performed under written contracts which specified a contract fee keyed to the length of time the field units were in operation. There was no division

of the contract fees between field operations and main office interpretation and final presentation. Only one fee was charged for the whole service. As to the activities involved in this case, each contract was made and entered into outside the State of Mississippi, each final map, interpretation and final report was delivered outside the State of Mississippi and no client was a resident of the State of Mississippi. The field units which operated in Mississippi were dispatched from Tulsa, Oklahoma, and were withdrawn upon completion of the field work. No permanent establishment was maintained by appellant in the State of Mississippi.

The appellee, through its agents, levied and collected taxes under Section 10110, Mississippi Code of 1942, upon appellant's gross receipts from the performance of services relating to lands lying in the State of Mississippi during the years 1951 and 1952. Appellant in due course brought suit to recover such taxes paid alleging, among other things; that assessment and collection of said taxes under the provisions of Section 10110, Mississippi Code of 1942, "was and is invalid and unlawful for the reasons (a) it constitutes a burdening of interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States; (b) it constitutes the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States." (Declaration, Par. 14)

Appellee denied these allegations and upon trial of the issues thus made, the Trial Court rendered judgment for the appellant stating that "the action of the defendant in assessing and collecting the taxes complained of

in the Amended Bill of Complaint and amendment thereto was invalid and unlawful for the reasons that (A) said action constituted the burdening of interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States, (B) said action constituted the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States." (Final Decree, Chancery Court, Hinds County, Mississippi.) On appeal to the Supreme Court of Mississippi appellee assigned as separate errors the holdings of the Trial Court on each of such constitutional grounds. The Supreme Court of Mississippi, acknowledging the lower court's holding, entered judgment of reversal stating, in its opinion, "We do not think that the assessment and collection of the tax constituted a burdening of interstate commerce within the meaning of the Commerce Clause of the Federal Constitution * * *." (Opinion, Supreme Court of Mississippi.)

In due course appellant filed its petition for rehearing (called Suggestion of Error), asserting, among other things, that "the Court concluded as a matter of law that the tax in question was not a burden on interstate commerce because there could not have been an additional exaction of tax on the same income by the State of Oklahoma. It is respectfully submitted that the Court has erred in this conclusion by reason of its error in attributing the appellee's income entirely to its field activities in Mississippi." (Suggeston of Error) The Supreme Court of Mississippi denied this petition for rehearing without opinion.

In view of the foregoing statement of the case and references to the pleadings and the judgments rendered by the Trial Court as well as the Supreme Court of Mississippi, it is respectfully submitted that the rulings of such courts were of a nature to bring this case within the statutory provisions believed to confer jurisdiction on this Court.

(e) Grounds on Which It Is Contended That the Federal Questions Are Substantial.

The tax complained of in this case was levied and collected by the State Tax Commission over the appellant's protest that the taxing statute, if so applied, was in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. This Court has said that the order of such a commission, being an instrumentality of the state and applying a state statute, "must be treated as an act of the legislature for purpose of determining our jurisdiction under 28 USC, Sec. 1257(2)." *Atchison, T. and S. F. Ry. Co.* v. *Public Utilities Comm.* 346 U. S. 346, 74 S. Ct. 92, 94, 98 L. ed. . . .

The Supreme Court of Mississippi upheld the action of the State Tax Commission under the state statute, reversing the Trial Court's judgment that the same was unlawful under the Federal Constitution. The decision of a state court enforcing a state statute of general scope against a particular transaction as to which there was a timely insistence that, if so applied, the statute was void under the Federal Constitution necessarily affirms the validity of the statute as so applied and the judgment is therefore reviewable by appeal, as here contended. See

Fisk v. Kansas, 274 U. S. 380, 385, 47 S. Ct. 655, 71 L. ed. 1108.

The appellant contended throughout that the transactions involved constituted interstate commerce, that the gross receipts taxed were derived from such transactions as a unitary and inseparable business in interstate commerce and that the tax fell without apportionment upon the proceeds of such interstate commerce and constituted the taking of property without due process of law. The appellee contended and the Supreme Court of Mississippi agreed, that the gross receipts taxed were derived from local activities in the State of Mississippi and thus violated no constitutional limitations. In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 68 S. Ct. 1260, 92 L. ed. 1633, it was recited that the state court passed upon the constitutional issues and expressly held that "there is no constitutional objection to taxation of total receipts here. This is not interstate commerce . . . ." This Court took jurisdiction of the case on the appeal under the equivalent of 28 U. S. C. 1257(2). It is of no consequence here that the state court concluded that there was no violation of the Constitution on the basis that there was no interstate commerce involved. This Court has said: "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U. S. 363, 367, 50 S. Ct. 121, 123. "We must judge the true nature of this tax in terms of the rights and liabilities which

the statute as construed creates. * * * The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax." *Society for Savings in City of Cleveland* v. *Bowers*, 249 U. S. 143, 150, 75 S. Ct. 607, 611, 99 L. ed. 950.

In this case the record is replete with evidence of the unitary and inseparable nature of the interstate commerce in which appellant was engaged as well as evidence that the gross receipts taxed were derived as unallocable income from such commerce. The Trial Court upheld the contentions of appellant with respect to this evidence without exception. The Supreme Court of Mississippi acknowledged in its opinion that there was no conflict in the evidence as to any material fact, stating that "we are not therefore confronted with the question of whether or not any finding of fact by the Trial Court is manifestly wrong as being against the overwhelming weight of the evidence." This Court has said in *Fiske* v. *Kansas*, *supra*, that it will review the findings of fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts. The cases in which this Court has acknowledged jurisdiction on appeal to review the facts to determine whether a tax complained of falls upon interstate commerce or upon a local activity are too numerous to require citation here.

It is further noted that the decision of the Supreme Court of Mississippi upholding the validity of the taxing

statute is in direct conflict with the decision of the Supreme Court of New Mexico with respect to a taxing statute of that state which, as applied to appellant there, was identical in effect for all intents and purposes. See *Seismograph Service Corp. v. Bureau of Revenue*, 293 P. 2d 977.

As further grounds for reversing the Trial Court the Supreme Court of Mississippi held that appellant's failure to keep records disclosing by its own arbitrary allocation the portion of its gross receipts which should be subjected to the tax in question defeated its contentions that the tax is unlawful. The Court in effect thus demands that the appellant by its records devise some means of apportioning its income from a unitary business in interstate commerce where no formula for apportionment is provided by the statute under which the tax was levied. This attempt to circumvent federal rights upon non-federal grounds has been dealt with by this Court before. In *Staub v. City of Baxley*, 355 U. S. 313, 319, 78 S. Ct. 277 281, 2 L. ed. 2d 302, it was said that, "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands." And, in *Meyer, Auditor, State of Oklahoma v. Wells-Fargo and Co.*, 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445, it was held that "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

The issues brought before this Court by this appeal requires a determination as to whether a) appellant's gross receipts in question were derived from the performance of a unitary and integral business in interstate commerce and b) were subjected to the gross receipts tax without apportionment. If so determined, then it would appear that the taxing statute and the assessment and collection of the tax here involved must be held unlawful and violative of the Commerce Clause and the Fourteenth Amendment to the Federal Constitution under the long line of cases in which this Court has consistently declared that "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce." *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365; *Freeman* v. *Hewitt*, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265; *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 74 S. Ct. 396, 98 L. ed. 583.

We respectfully submit that these determinations and the questions to which they pertain are so substantial as to require plenary consideration by this Court with briefs on the merits and oral argument for their resolution.

Conclusion.

It it respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under 28 U. S. C., Sec. 1257(2).

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APPENDIX

Appendix "A."

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,987

NOEL MONAGHAN, CHAIRMAN, STATE TAX COMMISSION,

vs.

SEISMOGRAPH SERVICE CORPORATION.

McGehee, Chief Justice:

This suit was filed by the appellee, Seismograph Service Corporation, incorporated under the laws of Delaware and having its principal office and place of business at Tulsa, Oklahoma, where it was maintaining such office and place of business during the taxing period in question in this case. The suit was filed against the Chairman of the State Tax Commission under the authority of Section 10124, Miss. Code of 1942, Recompiled, which provides, among other things, that "Any person improperly charged with any tax imposed by this act, and required to pay the same, may recover the amount paid together with interest, in any proper action or suit against the commissioner for the amount paid into the State Treasury * * *." The Act is known as the Sales Tax Law of this State but the same covers tax on compensation received for services rendered therein.

The incidence of the tax is upon the local activity and the protection afforded that activity by the laws of this State. While the tax in this case was originally predicated upon Section 10111, Miss. Code of 1942, Recompiled, which provides for a tax equal to 2% of the gross income of the business done in this State, the assessment herein was actually made under Section 10110 of the Miss. Code of 1942, Annotated, which provides a lesser rate of tax. Of course no point is made by the appellee-taxpayer on the specific ground that it was charged a tax at the rate of 1% on the assessment under the latter statute instead of 2% under said Section 10111.

Section 10111, Miss. Code of 1942 Recompiled, provides in part, as follows: "(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business: * * * Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas, and other mineral resources, not elsewhere taxed."

The appellee Seismograph Service Corporation was, during the taxing period in question, engaged in the making of seismographic surveys, with considerable equipment and personnel for the gathering of data for the location of oil and gas in Mississippi under written contracts with the California Company of New Orleans, Louisiana, the Gulf Oil Corporation of Houston, Texas,

the Marshal Young Company of Fort Worth, Texas, and the Skelly Oil Company of Tulsa, Oklahoma and in which written contracts the oil company is referred to as the "CLIENT". The appellee Seismograph Service Corporation, under the terms of the contract, was to furnish the scientific equipment necessary for the exploration of the area of land in this State designated by the client for the exploration, was to furnish the personnel for conducting the operation, and was to be reimbursed for only expendable material used in the seismographic survey, such as dynamite, etc.

The procedure in conducting the seismographic survey was for the appellee Seismograph Service Corporation to employ in the work what is called a "Basic Unit" and a "Drilling Unit," comprised of the equipment and personnel listed in exhibits to the written contract. The tax in question is based upon the gross receipts paid to the appellee by the clients for the work done by these two units in this State, which correspond with the amount of income reported by the appellee Seismograph Service Corporation to the State Tax Commission for the period in question.

It was franky admitted by the President of the Seismograph Service Corporation in his testimony at the trial that no charge *as such* was made in any of the invoices or mentioned in the contracts as to any services rendered outside of this State.

He referred to the scientific equipment used by the basic unit which included "the recording truck, which is

connected by cable to all the detectors laid out in a straight line on the ground." He testified that "Not too far away is the shooting truck, which is connected by telephone cable to the recording truck, and again an electric line goes from the shooting truck to the shot-hole for the detonation of the dynamite." And further that "On word from the operator in the recording truck the shooter pushes the blaster, and sets off the blast of dynamite." He also told the court that the holes were drilled by the drilling unit to a depth of about sixty feet that the hole was about four inches in diameter, and that the dynamite was placed at the bottom of this hole. The basic unit was comprised of a party chief, two computers, a party chief's car, and all necessary calculating, drafting and mapping equipment; that as a part of the crew there was an observer, assistant observer, a recorder's helper, a shooter and a shooter's helper; that the set of 24-trace seismic recording instruments included not more than fifty geophones, mounted on a standard truck, a water tank and all normal shooting accessories mounted on a standard truck; that the surveying unit consisted of a surveyor, rodman, a service automobile and a complete set of surveying instruments; and a list of the equipment and personnel of a drilling unit was also attached as an exhibit to one of the contracts which was introduced as being typical of all of the contracts involved between the Seismograph Service Corporation and its clients. He admitted that the work done in this State was by the basic and drilling units, and that what the appellee got out of the

field operation were the surveyor's notes, the surveyor's map of the locations, the observer's report of his records, the shooter's report as to the amount of dynamite he shot and that the field crew would make certain preliminary calculations and computations and a preliminary progress map, and that all of the information, maps and surveys were then mailed to the home office at Tulsa, Oklahoma, where there was a pool of expert geologists and geophysicists who interpreted the results of the data gathered by the basic units and the drilling units in Mississippi.

As required by the written contract the appellee would then make a report to the client as to their interpretations of the results of the work done in Mississippi by the basic unit and the drilling unit,

The President of the appellee-corporation, Mr. C. S. Wesby, further testified, among other things, as follows: Q. "Now, Mr. Wesby, as a matter of practice in your experience with your company has the company ever set a separate fee for the field work and for the interpretation work? A. No, it has not." and further: "Q. Now, your basic unit confines its work to the shooting of the holes on location and to the correct preparation of preliminary maps, as you say—A. That's correct. Q. In their surveying, do they not? A. That's correct. * * * Q. Now, that drilling unit also is a unit that is on location (evidently meaning in the area assigned to the appellee for seismographic exploration in Mississippi) and drills the holes in which the dynamite is placed for detonation, is it

not? A. That's correct. Q. Both the basic unit and drill units are used at work on location, are they not? A. That's correct."

Mr. Wesby was also asked: "Q. Under that provision of the contract you charged for the basic unit $8,200 a month, did you not? A. Yes, sir. Q. And under that contract you charged for the drill unit in accordance with the charges as stated in schedule (b) of the contract, did you not? A. That's correct. Q. And that was the only charge you made under that contract for services were they not? A. Yes, sir. Q. There was no charge made for any interpretative work, was there? A. The interpretative —Q. As such? A. As set out in an invoice? Q. As set out in the contract? A. The basic fee covers the interpretation. Q. Let me ask you my question again. There is no charge as such for interpretation work in the—on the face of the contract, is there, Mr Wesby? A. No, that's correct. • • • Q. All right, show me some place else in the contract where there are charges made for other work. A. No, there are no other charges but they are obligations that we—Q. I know—They were covered by these fees • • • Q. I am asking you the question on the face of the contract, are there any other charges made other than those for the basic unit and the drill unit? A. No, sir. Q. Now, both the basic unit and drill unit are units that operate locally, are they not, Mr. Wesby? A. That's correct." The witness, however, further stated: "It has grown up in the seismographic industry from the very beginning that there are two parts in the seismographic survey that I

have mentioned, that is, going out and getting the physical data and then following it up by the interpretation. * * *"

Notwithstanding that the president of the appellee corporation contended that there are two parts of a seismographic survey, part of the work done in the field in Mississippi and the remainder, the interpretation in Tulsa, Oklahoma, of the data gathered in Mississippi, neither the written contract nor the invoices, which were present but not introduced, in connection with the seismographic survey in Mississippi disclose that any charge was made for the interpretative work done at the home office at Tulsa, Oklahoma. The tax was assessed on the basis of the income reported by the appellee to the State Tax Commission in Mississippi. Sec. 10120, Code of 1942, Recompiled, makes it the duty of every person taxable under the Act to keep and preserve for a period of three years adequate records of the gross income, gross receipts or proceeds of sales of the business, etc.; and Sec. 10121, Code of 1942, Recompiled, provides that: "If adequate records of the gross income or gross receipts of sales are not maintained, or invoices preserved as provided herein * * * the Commisioner may make * * * assessments from the best information obtainable and shall give notice by registered mail of such returns and assessments, and such return and assessments shall be prima facie correct for purposes of this Act." The appellee evidently got notice, since it paid the tax, under protest, on the assessment.

The assessments, as previously stated, were made and the tax levied on the basis of the income earned by only the basic unit and the drilling unit in this state and the tax was paid in the sum of $11,176.88 by the appellee-taxpayer. But whether it was paid under protest or voluntarily is immaterial under the Act since it provides that any person improperly charged with any tax imposed by the Act, and required to pay the same, may recover the amount paid together with interest thereon.

The trial court sustained a special demurrer as to $9,003.50 of the amount paid by the taxpayer for the reason that this amount of the tax was passed on to, and collected from, the clients, and a taxpayer who has paid an improper tax into the state treasury can only recover such part thereof as was actually borne by such taxpayer. The decree in this case in favor of the appellee Seismograph Service Corporation was therefore for only the sum of $2,678.93, with interest from the date of payment until the date of the decree in the amount of $626.50, and the decree provides for interest at the legal rate of 6% thereafter until paid.

On the question of whether or not the trial court was correct in rendering a decree in favor of the appellee for a refund of the portion of the tax last above mentioned, the chancellor made no separate finding of fact, but held as a matter of law that the assessment of this tax by the State Tax Commission (a) constituted a burdening of Interstate Commerce in violation of Article I; Section 8 of the Constitution of the United States; and

(b) that the assessment and collection of the tax constituted the taking of private property without due process of law as prohibited by the Fourteenth Amendment to the Constitution of the United States.

We are of the opinion that the only questions presented on this appeal are questions of law there being no conflict in the evidence as to any material fact, that is to say, the issue here is whether either of the grounds upon which the decree was based is correct. We are not therefore confronted with the question of whether or not any finding of fact by the trial court is manifestly wrong as being against the overwhelming weight of the evidence.

We do not think that the assessment and collection of the tax constituted a burdening of interstate commerce within the meaning of the Commerce Clause of the Federal Constitution as construed by the Supreme Court of the United States in upholding numerous decisions of this Court wherein we have upheld the tax under the Act in question, as a tax upon a local activity engaged in within this State by the person or corporation against whom the tax is assessed.

The appellee relies strongly upon the case of Freeman v. Hewit, 91 L. ed. 265, 329 U. S. 249, decided in 1946, involving the sale of securities in interstate commerce. However, if that decision be applicable, and we do not think that it is, since there was no local activity such as manufacturing or exploration as a business involved, the Supreme Court of the United States on June 30, 1949, upheld the decision of this Court in the case of

Interstate Oil Pipe Line Company v. Stone, Chairman, State Tax Commission, reported in 203 Miss. 715, 35 So. 2d 73, 36 So. 2d 142, 93 L. ed. 1615, 337 U. S. 662, in which was involved a tax under our present statute on the local activity of the Interstate Oil Pipe Line Company which line extended from the lease tanks in oil fields in south Mississippi to a point on a railroad where the oil was loaded into railroad tank cars and shipped in inter state commerce. The tax assessed by this State against the local activity of this pipeline was upheld by the Supreme Court of the United States notwithstanding that the transportation of the oil to the railroad was an integral part of its transportation from the oil fields to points outside of this State, and where the transportation by the Interstate Oil Pipe Line Company from the oil field in this State to the point on the railroad in this State was a local activity and the transportation by the railroad thence to points out of the State was interstate commerce. See also, Stone, Chairman, State Tax Commission v. Stapling Machines Co., 220 Miss 470, 71 So. 2d 205, 348 U. S. 802, 99 L. ed. 470; and Stone, Chairman, State Tax Commission v. Stapling Machine Co., 221 Miss. 555, 73 So. 2d 123, 348 U. S. 907, 99 L. ed. 711.

In the case of Cook v. Stone, Chairman of State Tax Commission, 192 Miss. 219, 5 So. 2d 223, we held that a tax against a contractor was based on the local activity and was for the protection afforded by the State during the progress of the work, and was a valid tax and in the course of the opinion, we said: "* * * The tax, we repeat, is upon the local activity of doing this work, not upon the

issue of its ultimate acceptance and the payment thereof as a finished product."

In the case of Stone, Chairman of the State Tax Commission v. York Ice Machinery Corporation, 193 Miss. 638, 10 So. 2d 380, but which the taxpayer did not see fit to appeal, there was involved a tax against the local activity for the installation, adjustment and testing of certain air conditioning systems in buildings in this State, where the air conditioning systems had been manufactured out of this State and shipped here in interstate commerce, and we held that although the installation, adjustment and testing of the air conditioning systems constituted a substantial part of the performance of the contract for the sale of the machinery and equipment which was shipped here in interstate commerce the local activity of the experts who installed, adjusted and tested the systems in this State was subject to the tax and that the same was not a prohibitive burden on interstate commerce. We further held that the fact that the installation, adjustment and testing of the air conditioning systems constituted a substantial portion of the performance of the contract of sale as a condition precedent to final acceptance by the purchasers, did not prevent the local activity from being subject to the tax.

We do not think that the case of Gross Income Tax Division, Indiana Department of State Revenue, State of Indiana v. Surface Combustion Corporation 232 Ind. 100, 111 N. E. 2d 50, certiorari denied, 346 U. S. 829, 98 L. ed. 353, is in conflict with the decision being rendered by

us in the case at bar. The appellee in its brief recognized that "a tax on an interstate sale, coupled with the installation services may be *invalid* where the skill and peculiar knowledge required in such installation services were *not* such as were 'intrinsically related to and inherently a part of the sale * * *'" (Emphasis supplied). But here the work done in Mississippi was "intrinsically related to and inherently a part of" the operation in question. In fact, the work done in this State was essential to the interpretative work done in the appellee's home office at Tulsa, Oklahoma, but we see no reason why the appellee should not have separated the charges for the value of the work done in Mississippi from the va[illegible] of the work done in Tulsa, Oklahoma, but which it failed to do. Moreover, we think that the requirement of the statute for the taxpayer to keep adequate records is a reasonable exercise of the legislative power and was an essential requirement to enable the State Tax Commissioner to properly administer the Sales (or service) Tax Law.

In the case of McGoldrick v. Berwind-White Coal Mining Company 309 U. S. 32, 33, 60 S. Ct. 383, 34 L. ed. 565, which we cited in the case of Stone, State Tax Commissioner v. York Ice Machinery Corporation, supra, held, among other things, that: "* * * it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. Western Live Stock v. Bureau of Revenue, 30[illegible]

U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. ed. 823, 115 A. L. R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress."

In the instant case we are unable to conceive how this tax unconstitutionally interferes with interstate commerce or can amount to double taxation, since the State of Oklahoma would be without power to tax the local activity of the appellee in this State, which is here involved. By the expedient of keeping adequate records by the appellee, the appellant State Tax Commission would have been able to apportion the tax on the local activity so that it would not embrace any receipts for the services rendered by the taxpayer in the State of Oklahoma in the interpretation of the data obtained here as to subsurface structures. But according to the undisputed testimony in this record, no separate charge was made *as such* by the appellee for the services rendered in Oklahoma; the tax was imposed upon the gross receipts and income reported by the appellee to the State Tax Commission of Mississippi "from the best information obtainable," to wit: the report of the appellee of its income made to the State Tax Commission from the activities of the basic and drilling units in this State. A taxpayer engaged in local activities in this State that is connected

with interstate commerce should not be permitted to commingle its income received from activities in another state with the income received from activities in this State, and then be heard to complain that the tax is imposed upon unapportioned income, where such unapportionment is due to the failure of the taxpayer to comply with the law in regard to keeping adequate records as to the income received from activities performed in this State, and where the taxpayer may thereby escape paying tax on this income anywhere.

In the case of Freeman v. Hewit, supra, the Supreme Court of the United States was not in accord with the view of one of the justices who was apprehensive that the Court was there reversing the trend of its former decisions in regard to the right of a state to impose a tax upon a local activity. In fact, no local activity of any consequence was involved in that case.

Again, the burden was on the appellee to show that the tax here involved violated the commerce clause of the Federal Constitution. To meet that burden, the appellee only undertook to show that the services rendered in Oklahoma, though not charged for under the contracts and invoices here involved, were a part of, and included in, the base fee collected from the client in connection with the local activities in this State; but the appellee, which alone knew the facts, failed to show what portion of the base fee should be allocated to the services rendered in Okahoma, and failed to disclose the information upon which the tax claimed for activities in this State could

be apportioned, a part to Mississippi and a part to Oklahoma—in compliance with the reasonable requirement of our statute, which made it necessary for the State Tax Commissioner to make the assessment on the best information obtainable. The Commissioner was justified in using the information furnished by the taxpayer to the State Tax Commission in its return of its income received for its activities in this State. In response to Interrogatory No. 3, contained in the appellee's pleadings, the appellee conceded upon the trial that the gross income reflected on its state income tax return here was the same figure upon which the tax here involved was imposed.

The appellee in the instant case is not in position to complain that the tax in question was assessed against unapportioned income (If such was the case), since the State Tax Commissioner, as aforesaid, was not furnished information upon which he could determine how much the taxpayer owed so as to enable him to allocate any definite portion of the gross receipts reported to him as income of the taxpayer in this State, other than by the method of imposing the tax upon the income reported to the Commission by the taxpayer as income earned in this State. If the taxpayer is having to pay more taxes on the amount received for services performed in this State than it would have had to pay thereon if a part of its total income had been apportioned to the Tulsa, Oklahoma office, the increased exaction would be due to the failure of the taxpayer to keep adequate records in order that the proper allocation could be made.

The only records shown to have been kept by the taxpayer were the written contracts introduced in evidence and the invoices presented, but not introduced in evidence, for the work done and the price received, and there was nothing in the contract or invoice to show that any part of the charge was for services performed in Oklahoma, as hereinbefore stated, notwithstanding that the president of appellee-corporation testified that the charges for the interpretative services in Tulsa, Oklahoma, were included in the basic fee of $1,975 per week for the basic unit and $450 for the drilling unit. As heretofore shown, the Act in question required that this and all other taxpayers should keep adequate records in order that the Commissioner may determine how much the taxpayer owes the State.

It is a matter of common knowledge that the operation of these two units by the appellee and others engaged in seismograph explorations in this State is a local activity of considerable magnitude and is carried on throughout the State.

We recognize that the Supreme Court of New Mexico has in the case of Seismograph Service Corporation v. Bureau of Internal Revenue, 293 P. 2d 977, reached a contrary conclusion as to whether or not such a tax here involved was a burden on interstate commerce, and while we have great respect for the decisions of other state courts we feel it our duty to follow the rule that they are not necessarily binding on this Court, according to what is said in 21 C. J. S., Sec. 204, p. 356; and Mast, Fox and

Company v. Stover Mfg. Company, 177 U. S. 485, 44 L. ed. 856. We are like the Supreme Court of New Mexico, endeavoring to follow the previous decisions of our Court, some of which have been affirmed by the Supreme Court of the United States, as hereinbefore shown.

As hereinbefore stated, since the unapportionment of the tax as between the work done in Mississippi and that done in Okahoma is due to the failure of the taxpayer to keep such records as would enable the Commissioner to make the proper apportionment, the taxpayer is in no position to complain that the State Tax Commission assessed it on the basis of its reported earnings in this State—"the best information obtainable." There was not, and could not have been, an additional exaction of such a tax, on the same income from these local activities made by the State of Oklahoma.

We are therefore of the opinion that the decree of the trial court should be reversed and the case dismissed.

Reversed and judgment here for Appellant. Lee, Kyle, Holmes and Arrington, JJ., concur.

Appendix "B."

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 51,242

SEISMOGRAPH SERVICE CORPORATION,
Complainant,
vs.
NOEL MONAGHAN, CHAIRMAN STATE TAX COMMISSION, Defendant.

FINAL DECREE

This cause coming on to be heard on amended bill of complaint, answer to amended bill of compaint, amendment to amended bill of compaint, and answer thereto, stipulation of counsel, oral and documentary evidence; and the Court having heard all of the same together with arguments of counsel, and being now fully advised in the premises, the Court is of the opinion and so finds that the action of the defendant in assessing and collecting the taxes complained of in the amended bill of complaint and amendment thereto was invalid and unlawful for the reasons that:

(A) Said action constituted a burdening of interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States;

(B) Said action constituted the taking of private property without due process of law as prohibited by the 14th Amendment to the Constitution of the United States.

The Court further finds that the complainant is entitled to the relief prayed for in its bill.

It is therefore hereby ordered, adjudged and decreed that said complainant do have and recover of and from the said defendant the sum of $2,678.93 together with interest to this date in the amount of $626.50 and interest on the principal amount at the rate of 6% from this date until paid together with all costs herein.

The defendant feeling aggrieved at this order and praying for an appeal the same is hereby granted.

The complainant feeling aggrieved at the order of this Court sustaining the special demurrer of the defendant and praying for a cross-appeal the same is hereby granted.

ORDERED, ADJUDGED AND DECREED on this the ..... day of March, 1958.

Chancellor